

ESTTA Tracking number: **ESTTA627431**

Filing date: **09/16/2014**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91205046
Party	Defendant Ate My Heart Inc.
Correspondence Address	BRAD D ROSE PRYOR CASHMAN LLP 7 TIMES SQ, FL 3 NEW YORK, NY 10036-6569 UNITED STATES lbuckley@pryorcashman.com, rklarberg@pryorcashman.com, tmdocketing@pryorcashman.com, brose@pryorcashman.com, tlee@pryorcashman.com, tmdocketing@pryorc
Submission	Reply in Support of Motion
Filer's Name	Lisa M. Buckley
Filer's e-mail	lbuckley@pryorcashman.com, rklarberg@pryorcashman.com, tmdocketing@pryorcashman.com, brose@pryorcashman.com, jalbrink@pryorcashman.com
Signature	/Lisa M. Buckley/
Date	09/16/2014
Attachments	Reply Brief iso Motion for Judgment (with Declaration)- 9 16 14.pdf(119504 bytes )

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of U.S. Reg. No. 2,898,544 for  
GAGA PURE PLATINUM

-----X		
CHRISTINA SUKLJIAN,	:	
	:	
	:	Opposition No. 91/205,046
	:	
Opposer,	:	
	:	
v.	:	
	:	
ATE MY HEART, INC.,	:	
	:	
	:	
Applicant.	:	
	:	
	:	
ATE MY HEART, INC.,	:	
	:	Cancellation No. 92/055,279
	:	
Petitioner,	:	
	:	
v.	:	
	:	
CHRISTINA SUKLJIAN,	:	
	:	
	:	
Respondent.	:	
-----X		

**PETITIONER ATE MY HEART, INC.'S REPLY BRIEF IN SUPPORT OF ITS  
RENEWED MOTION FOR DEFAULT JUDGMENT**

Petitioner/Applicant Ate My Heart, Inc. ("AMH," "Petitioner" or "Applicant"), in accordance with Rule 527 of the Trademark Trial and Appeal Board Manual of Procedure ("TBMP"), 37 C.F.R. § 2.120(g), hereby replies in support of its renewed motion seeking an order cancelling Respondent/Opposer Christina Sukljian's ("Sukljian," "Opposer" or "Respondent") mark, GAGA PURE PLATINUM, U.S. Reg. No. 2,898,544.

## PRELIMINARY STATEMENT

AMH demonstrated its entitlement to judgment in its favor in these Opposition and Cancellation Proceedings, and none of the spurious statements in Suktjian's opposition papers cast doubt on that conclusion. Suktjian exclaims that she has produced substantial evidence in discovery demonstrating her prior, continuous use of her GAGA PURE PLATINUM mark since 2001.<sup>1</sup> But the Board has determined on two prior occasions that Suktjian has been uncooperative in discovery. She has repeatedly violated Board Orders. The Board has sanctioned Suktjian by, among other things, precluding her from introducing at trial any evidence that she had not produced to AMH as of the date AMH filed its September 26, 2013 sanctions motion. Most recently, in its June 12, 2014 Order, the Board warned Suktjian that if she did not show up for a noticed deposition, judgment might be entered against her. Suktjian made the informed decision not to show up for a noticed deposition.

Suktjian's excuses are transparent. She wants the Board believe that, between June 17, 2014 and June 24, 2014, it was impossible for her to return one of AMH's counsel Mr. Klarberg's telephone calls or respond to his email communication. Suktjian also was apparently unable to seek relief from the Board when she was purportedly unable to attend a deposition on June 26, 2014, the noticed date. None of these excuses are plausible.

---

<sup>1</sup> Suktjian spends roughly 10 pages of her opposition memorandum of law arguing that she has not played games in discovery and that she has produced mounds of evidence supporting her claim that she has been selling GAGA PURE PLATINUM branded cosmetics continuously since 2001. In doing so, Suktjian seeks to reargue motions that she lost. Suktjian made the same exact arguments in opposition to AMH's September 26, 2013 motion for sanctions for Suktjian's failure to comply with the Board's August 5, 2013 order, which the Board granted on January 28, 2014 (precluding Suktjian from using at trial any information or documents that would have been responsive to AMH's discovery requests, but that she failed to produce prior to AMH's filing of the motion for discovery sanctions). Further, Suktjian has not introduced any evidence reflecting that she has been using the GAGA PURE PLATINUM mark in commerce continuously since 2001 (her purported date of first use in commerce). In fact, Suktjian has failed to produce a single document reflecting any of the following: (i) any sales whatsoever, let alone sales of her own Class 3 goods identified in her registration; (ii) any customers for goods bearing the GAGA PURE PLATINUM mark; (iii) any use of the GAGA PURE PLATINUM mark prior to AMH's January 11, 2011 filing date for the HAUS OF GAGA mark; or (iv) any other evidence proving continuous use of the GAGA PURE PLATINUM mark since 2001. This is a clear case of trademark abandonment.

The record shows that Sukljian is a recidivist, brazenly violating every order the Board has issued. There is no unfairness in her now suffering the consequences of her deliberate acts. The Board should enter judgment in favor of AMH and against Sukljian in both of these Opposition and Cancellation Proceedings.

### **FACTS**

The facts have been detailed in AMH's moving papers and prior submissions to which the Board is respectfully referred. Only the few facts salient to this dispute are repeated.

### **ARGUMENT**

The Board issued an order sanctioning Sukljian for what the Board referred to as playing games in discovery. Board's August 5, 2013 Order at p. 11. The Board has precluded Sukljian from introducing into evidence any documents or information that she had not produced to AMH by September 26, 2013. Board's January 28, 2014 Order at p. 6. The Board repeatedly warned Sukljian about the grave consequences that could befall her if she continues playing games in discovery, including the entry of judgment against her. The Board specifically admonished Sukljian that her failure to show up for a noticed deposition could result in judgment being entered against her in these Proceedings. Board's January 28, 2014 Order at p. 8; Board's June 12, 2014 Order at p. 3. Sukljian then made the knowing choice not to show up for a noticed deposition. Sukljian's protestations that she has not played games in discovery have already been rejected by the Board. Board's August 5, 2013 Order at p. 11.

Sukljian's excuses for not appearing for her deposition are see through. In a June 12, 2014 Order, the Board granted AMH's motion to extend its time to depose Sukljian until June 30, 2014. Board's June 12, 2014 Order at p. 2-3. After several attempts to reach Sukljian by phone

on June 17, 2014 to mutually agree on a date for her deposition, AMH noticed Sukljian's deposition for June 26, 2014. *See* Klarberg Decl. dated August 12, 2014 at ¶¶ 3-5.

Sukljian provided no credible reason why she could not have returned Mr. Klarberg's call if she wanted to change the date of her deposition. If, as she says, she was not available to do so on June 17, when Mr. Klarberg left his messages, there was no reason why Sukljian could not have returned the call on a subsequent day anytime between June 18 and 25.

On June 24, 2014, AMH's counsel received a letter from Sukljian saying she was unavailable on June 26 and that she wanted to be deposed in August. Counsel for AMH, Mr. Klarberg, attempted to reach Sukljian by phone as soon as he received the letter. Unsuccessful, Mr. Klarberg then emailed Sukljian, pointing out the obvious: that he needed to hear back from her by the end of the day if she wanted to reschedule her deposition. AMH was not willing to put off the June 26 deposition unless the Board granted permission to do so. Given that AMH's counsel received a letter from Sukljian on June 24 trying to reschedule a June 26 deposition, Mr. Klarberg needed to speak with Sukljian by the end of the day on June 24 if they were going to pursue Board approval of an extension of the deadline to depose Sukljian. Sukljian complains that she could not respond to Mr. Klarberg's email by the end of the day on June 24. Even if true, nothing stopped her from contacting Mr. Klarberg either by phone or email at any time prior to June 26. She did not do so.

Sukljian's claim that "Petitioner had knowledge that Respondent was unable to communicate on June 24, 2014" and her suggestion that AMH's counsel's deadline for response was a set-up (Sukljian Br. at 2) is unsupported and false, as attested to by Mr. Klarberg in the accompanying Reply Declaration. But, it is also irrelevant to explain why Sukljian did not call

back or email Mr. Klarberg the next day—or any day between June 18 and 25—or why she did not seek relief from the Board.

Sukljian also complains that AMH's counsel's demand that he hear back from her by the end of the day on June 24 to adjourn a June 26 deposition was unreasonable because AMH had until June 30 to conduct her deposition. Aside from the fact that the parties needed time to seek Board approval of an adjournment past June 30, and June 28 and 29 were weekend days, Sukljian never says she would have attended the deposition had it been rescheduled for June 27 or 30—the only other business days left on which to conduct her deposition in accordance with the schedule set forth in the Board's June 12 Order.

Sukljian was aware that if she did not contact Mr. Klarberg by close of business on June 24, AMH intended to proceed with the noticed deposition on June 26 because Mr. Klarberg told her so. On June 25, AMH's counsel traveled approximately 150 miles from New York City to Albany for the sole purpose of deposing Sukljian on June 26. Counsel for AMH stayed at an Albany hotel overnight, reserved a hotel conference room, and hired a stenographer and videographer to record Sukljian's deposition. Notwithstanding that the Board in its January 28 and June 12, 2014 Orders directly warned Sukljian that her failure to appear at a noticed deposition could result in the entry of judgment against her, Sukljian did, in fact, fail to appear, and AMH's counsel traveled 150 miles back to New York City, traveling a combined total of *300 miles* without taking Sukljian's deposition.

In sum, Sukljian's unsupported excuses for her failure to appear at a noticed deposition strain credulity. She had the ability to immediately resolve the scheduling of the deposition by contacting AMH's counsel directly by either telephone or e-mail, but she chose not to take such good-faith and practical measures. Instead, Sukljian violated another Board order with full

knowledge that her doing so could result in a judgment being entered against her—precisely the relief sought by AMH on this motion.

The Board has the inherent authority to enter sanctions against a party in the form of judgment. See *Super Bakery, Inc. v. Ward E. Benedict*, 96 U.S.P.Q.2d 1134 (T.T.A.B. 2010) (*aff'd Ward E. Benedict v. Super Bakery, Inc.*, 101 U.S.P.Q.2d 1089 (Fed. Cir. 2011)) (entering judgment against pro se respondent for failure to comply with discovery orders, and imposing the sanction of cancellation of his trademark registration); see also *Patagonia, Inc. v. Joseph Azzolini*, 109 U.S.P.Q.2d 1859 (T.T.A.B. 2014) (same).

If there ever was a case where it was appropriate for the Board to enter judgment against a party as a sanction for discovery abuses and violation of Board orders, this is it. AMH respectfully requests that the Board enter judgment in its favor and against Sukljian in these Proceedings.

### **CONCLUSION**

The Board has already ruled that Sukljian is precluded from relying on documents that she did not produce in discovery and facts that she did not disclose in response to interrogatories. Sukljian did not produce any documents or facts showing that she has been using her mark continuously since 2001, when it was filed.

Now that Sukljian failed to appear for her duly noticed deposition, notwithstanding the Board's express warnings, AMH respectfully requests, as a third and final sanction for Sukljian's steadfast refusal to cooperate, that the Board enter judgment against Sukljian and in favor of AMH in this consolidated proceeding, formerly Cancellation No. 92/055,279 and Opposition No. 91/205,046.<sup>2</sup>

---

<sup>2</sup> In the alternative, AMH respectfully requests that the Board, at a minimum, preclude Sukljian from testifying at trial.

Dated: September 16, 2014

Respectfully submitted,

PRYOR CASHMAN LLP

By: 

Brad D. Rose

Lisa M. Buckley

Ryan S. Klarberg

7 Times Square

New York, New York 10036

(212) 421-4100

*Attorneys for Ate My Heart, Inc.*



**CERTIFICATE OF SERVICE**

I certify that on September 16, 2014, a true and complete copy of the foregoing PETITIONER ATE MY HEART, INC.'S REPLY BRIEF IN SUPPORT OF ITS RENEWED MOTION FOR DEFAULT JUDGMENT and the DECLARATION OF RYAN S. KLARBERG dated September 16, 2014 was served by First Class Mail, postage prepaid, to Respondent at the following address:

Christina Sukljian  
13 Manor Street  
Albany, NY 12207

  
\_\_\_\_\_  
Ryan S. Klarberg

Dated: September 16, 2014

In the Matter of U.S. Reg. No. 2,898,544 for  
GAGA PURE PLATINUM

Respondent.

Cancellation No. 92/055,279

1. I am associated with the law firm of Pryor Cashman LLP, counsel for Petitioner/Applicant Ate My Heart, Inc. (“AMH,” “Petitioner” or “Applicant”) and have personal knowledge of all of the facts and circumstances set forth herein. I submit this declaration in

connection with Petitioner's Reply Brief in support of its Renewed Motion For Default Judgment against Respondent/Opposer Christina Sukljian ("Sukljian," "Opposer" or "Respondent").

2. On June 24, 2014, I called Sukljian at approximately 10:28 a.m. I was advised by Sukljian's receptionist that Sukljian was "unavailable." I left my name, law firm name, direct telephone number and a message stating that because of the Board's discovery deadline, we needed to hear back from Sukljian by 4:00 p.m. that same day or we would proceed with the deposition as noticed.

3. Not having reached Sukljian by telephone, at 12:11 p.m. on June 24, 2014, I e-mailed Sukljian at [info@zela.com](mailto:info@zela.com), the authorized correspondent e-mail address of record, stating, in part:

Now it is two days before the noticed deposition . . . Unless we hear from you by close of business today to discuss an alternative deposition date in July, and agree in writing to an extension of the Board's internal deadline, which must be approved by the Board, we will appear in Albany at the designated time and place to conduct your deposition. Your failure to appear may result in sanctions . . . Considering the circumstances, the only way we will consider changing the scheduled deposition date of June 26 is if you return our phone call or respond to our email before 4:00 p.m. today. If we do not hear from you by then, we will expect your attendance on June 26. We will seek sanctions against you if you fail to appear. For the avoidance of any doubt, my direct telephone number is 212-326-0183. I am in the office all day. If you receive my voice mail, please call my colleague Lisa Buckley directly at 212-326-0483. We look forward to hearing back from you soon.

4. Sukljian failed to respond to my June 24, 2014 telephone call or e-mail.

5. I was only advised by Sukljian's receptionist that she was "unavailable" at the time I called her, which was at approximately 10:28 a.m. I never received any indication that Respondent was unable to communicate the entire day of June 24, 2014.

6. AMH's counsel set the 4:00 p.m. deadline on June 24, 2014 in order to have sufficient time to either seek Board approval of an adjournment past June 30 or, alternatively, prepare for Ms. Sukljian's deposition and finalize all of the reservations made in connection with the deposition, including, but not limited to, my hotel room reservation, the conference room

reservation, my round trip transportation reservation between New York City and Albany, and the reservations with both the stenographer and the videographer that appeared for the deposition.

I declare, under the penalty of perjury, that the foregoing is true and correct.

Dated: New York, New York  
September 16, 2014

  
\_\_\_\_\_  
RYAN S. KLARBERG